COMMONWEALTH OF MASSACHUSETTS

HOUSING APPEALS COMMITTEE

ARCHSTONE COMMUNITIES TRUST

v.

WOBURN BOARD OF APPEALS

No. 01-07

DECISION

June 11, 2003

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HOUSING APPEALS COMMITTEE

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DECISION

I. PROCEDURAL HISTORY

This is an appeal pursuant to G.L. c. 40B, sec. 20-23, from the decision of the Woburn Board of Appeals with respect to the comprehensive permit application of Appellant Archstone Communities Trust.

On September 28, 2000, Archstone submitted to the Woburn Board of Appeals a comprehensive permit application for the construction and operation of a 640 multi-family unit project on a 74.46 acre parcel of land located at 35 Cambridge Road, Woburn, Massachusetts. See Exhibit 3. Archstone filed an Addendum to the Application on November 15, 2000 ("Addendum No. 1"). See Exhibit 21. A second Addendum was filed on January 3, 2001 ("Addendum No. 2"). See Exhibit 22. The proposed development is to be financed by Citizens Bank, utilizing funds made available through the New England Fund

(NEF) program of the Federal Home Loan Bank of Boston. See Part I of Application, Exhibit 3 at page 3.

After due notice and public hearings, the Board issued a decision granting Archstone a comprehensive permit with 50 conditions. See Exhibit 13. From this decision, Archstone appealed to the Housing Appeals Committee. The Committee, through its Chair, Werner Lohe, held a conference of counsel, and subsequently specially designated Lauren Stiller Rikleen to hear evidence and develop a decision for the Committee's review and approval.

Through the specially designated Hearing Officer, the Committee conducted a site visit, executed a Pre-Hearing Order on February 5, 2002, agreed to by the parties, and held 27 days of evidentiary hearings with witnesses sworn, full rights of cross-examination, and a verbatim transcript. In addition to the extraordinary length of the testimony (encompassing over 3,334 pages of transcript), 170 exhibits were admitted into evidence. Following the presentation of evidence, counsel submitted post-hearing briefs, as well as proposed findings of fact and rulings of law.

II. FACTUAL BACKGROUND

In its application, Archstone proposes to construct a 640-unit apartment complex on a 74.46-acre parcel of land located at 35 Cambridge[1] Road in Woburn, Massachusetts. See Exhibit 3. The parcel of property is owned by Northeastern University and is bordered on the east by Cambridge Road/Route 3, on the north by Northeastern University's Burlington Campus, on the northwest and southwest by Boston Public Parks open space land, and on the

1. The Committee notes that in testimony and exhibits, the street is referred to as both Cambridge Road and Cambridge Street.

south/southeast by a residential subdivision accessed by Sylvanus Wood Road and by Kosciusko Street. See site aerial depiction at Exhibit 2. It is relevant to these proceedings that Cambridge Road/Route 3 is a heavily trafficked, major arterial road that intersects with Route 128.

The proposed development consists of thirty-two, twenty-plex buildings, comprising a total of 640 apartment units. Twenty-five percent (25%) of the units would be affordable housing units at rents that would not exceed 30% of household income at 80% of area median income on an annual basis. See Part I of Application, Exhibit 3 at 1. Of the two separate building types proposed, one would consist of twenty-two, two-story garden apartment buildings with twelve one-bedroom units and 8 two-bedroom units per building. The second building type would consist of a two-story/three-story split garden apartment that includes ten one-bedroom and ten two-bedroom units per building. The application also proposes a 5,500 square foot recreation center. See Part 1 of Application, Exhibit 3, at 2. See also September 28, 2000, cover letter by Scott D. Shaull submitting Archstone*'s* application to the Board.

On September 10, 2001, the Board issued a written decision granting Archstone a comprehensive permit. See Exhibit 13. The comprehensive permit set forth 50 conditions including, most significantly, that the proposed development be limited to 300 units, instead of the 640 units proposed. See Exhibit 13 at 10-16.

III. PRELIMINARY ISSUES

A. Jurisdictional Requirements

The Appellant is a limited dividend organization pursuant to the requirements of 760 CMR 31.01(1)(a). See Pre-Hearing Order, Stipulation No. 11 at 3.

The Appellant controls the site pursuant to the requirements of 760 CMR 31.01(1)(c). See Pre-Hearing Order, Stipulation No. 14 at 3.

The proposed development is fundable under the New England Fund ("NEF") program, pursuant to the requirements of 760 CMR 31.01 (1)(b). See Pre-Hearing Order, Stipulation No. 12, at 3.[2]

B. Statutory Minima

Section 20 of Chapter 40B states that requirements imposed by a board of zoning appeals shall be considered consistent with local needs where:

(i) more than 10% of the city's or town's housing units consist of low or moderate income housing; or

(ii) low or moderate income housing exists on sites comprising one and one-half percent or more of the total land area zoned for residential, commercial, or industrial use; or

(iii) the application before the board would result in the commencement of construction of low and moderate income housing on sites comprising more than three tenths of one percent of the city or town's land area or 10 acres, whichever is larger, in any one calendar year.

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2. At the conclusion of the testimony and in its Post-Hearing Memorandum, the Board asserted that Archstone failed to fulfill the jurisdictional requirements of 760 CMR 31.01(1)(b), which requires that the Project be fundable by a subsidizing agency under a low and moderate income housing subsidy program. See Post-Hearing Memorandum of Appellee at 2 and 3. The Appellant argued that these jurisdictional requirements were not met because the Appellant failed to introduce evidence that Citizens Bank filed an application to the Federal Home Loan Bank prior to August 23, 2002, in order to ensure funding by the New England Fund. See Appellee's Proposed Rulings of Law at page 2. By letter dated October 30, 2002, Archstone submitted a September 20, 2002, letter from the Federal Home Loan Bank of Boston to Citizens Bank informing Citizen's Bank that its application for a New England Fund advance for purposes of funding this project were approved. Accordingly, Archstone has not failed to fulfill the jurisdictional requirements of 760 CMR 31.01(1)(b). As agreed to by the parties, the September 20, 2002, letter shall be included in the record as Exhibit 170. See Transcript Vol. XXVIII at 104.

With respect to these statutory criteria, the parties have stipulated that Woburn's percentage of low or moderate income housing units is 6.16% and, therefore, below the 10% statutory threshold. See Pre-Hearing Order, Stipulation No. 10 at 2. In its decision, the Board found that the total number of affordable housing units in Woburn occupies sites comprising less than one and one-half percent of the total land area zoned for residential, commercial, or industrial use. See decision at Exhibit 13, Finding No. 9 at 3.

Accordingly, the only statutory minima at issue is whether the application would result in the commencement of construction on sites comprising more than three tenths of one percent of the city's land area.

The Appellant concurs with the city's calculation that three tenths of one percent of the total land area in Woburn is 16.24 acres. See Post-Hearing Brief of Appellant at 9. The parties do not agree, however, as to whether the proposed development would result in the commencement of construction in excess of 16.24 acres annually.

The total impervious areas of the development (excluding walkways) comprise 28.4% of the site or 21.2 acres; these impervious acres consist of the apartment building footprints, community center building, drives and parking. Open space areas constitute 71.6% of the site or 53.3 acres. These open space areas consist of preserved natural wetland areas, preserved natural upland areas, and landscaped areas. See Pre-Hearing Order at 2. Appellant’s land planning expert, Sandy Vance, testified that the preserved natural wetland areas constitute 11 percent of the site or 8.2 acres, and that preserved natural upland–that is, heavily wooded areas–constitute an additional 31.3 percent of the site or 23.3 acres. Landscaped areas constitute 29.3 percent or 21.8 acres. See Transcript Vol. I at 68-70.

The Appellant argues that when determining the area of land that should be used to calculate whether construction will occur on sites comprising three tenths of one percent of the land zoned for residential, commercial or industrial use, the determining factor is the amount of land on which actual construction will occur, that is, the 21.2 acres of impervious surface. Further, it asks the Committee to accept the testimony of Mr. Robert Daylor of Daylor Consulting Group that the development would not result in actual construction on more than 16.24 acres in any one calendar year, based on the calculation that construction includes only the units, paving and driveways, and excludes work necessary to create open space and landscaped areas. See, e.g. Transcript Vol. XXIII (R. Daylor) at 54-55. This position, it argues, is consistent with *Robinwood, Inc., v. Board of Appeals of the Town of Rockland*, No. 72-03 (Housing Appeals Committee Dec. 3, 1975).

We interpret our decision in *Rockland* slightly differently. In that case, the 0.3% limit was 15.86 acres. The critical point is that the developer "would not be commencing construction on a site in excess of more than 15.86 acres in any one calendar year because construction of the project would extend over two or three calendar years…." *Rockland, supra*, slip op. at 8. The decision is ambiguous because it goes on to note that 83% of the site is open space, and then suggests that only the remaining 17% on which construction will take place, which is well under the 15.86 limit, should be considered in the 0.3% calculation.[3] But it concludes by once again discussing the "time phasing of this proposed development."

In the case at hand, we believe that the land area that should properly be counted toward the 0.3% limit is not the entire site (as some might argue), nor just the impervious

3. The *Rockland* decision is particularly confusing since it appears to calculate this figure improperly—as 2.70 acres, rather than 3.41 acres.

surface (as the developer argues), but rather the area which will actually be disrupted, that is, the impervious area plus the landscaped area—43 acres. This is well above the 16.24-acre statutory, 0.3% limit in Woburn.

The statute provides little practical guidance as to exactly how the 0.3% limit should be applied.[4] Two principles seem clear, however. First, the use of the words "calendar year" makes it clear that when construction is in phases, one phase of construction up to the 0.3% limit may properly begin near the end of one calendar year, and a second phase of the same size may commence early in the next calendar year.

Second, the words chosen by the legislature show that it was concerned not with ongoing construction, but rather with the "commencement" of construction. This is an indication that the protection that the legislature desired to afford to the town was not of an environmental nature. That is, if the legislature had intended to protect towns from having a large land area cleared and exposed to the elements, it would have referred to land "under construction," not "commencement of construction." The most logical inference to be drawn from this is that the legislature's concern was that there should be phasing of very large developments so that the town would have notice so that it could make plans to ensure that town infrastructure and services would accommodate the new housing and residents. However, the town is protected in this manner either if the development is built in phases up to the maximum 0.3% limit in each calendar year or if the developer delays the start of construction of the entire development—in this case, so that construction continues through

4. The law provides that housing may be prohibited if "the application before the board would result in the commencement of construction of such housing on sites comprising more than three tenths of one per cent of [total town] land area or ten acres, whichever is larger, in any one calendar year." G.L. c. 40 B, § 20.

2005. Therefore, Condition No. 7 (Exhibit 13, p. 11) is upheld, but it shall be modified to be consistent with our interpretation of the 0.3% limitation. See § VI-2, below.

C. Compliance with Statutory Timeframe for decision

The Board commenced its first public hearing to consider the application on October 18, 2000, and continued the hearing on several subsequent dates through May 23, 2001. On May 25, 2001, Archstone appealed to the Committee, requesting a determination that the application had been constructively denied by virtue of the unreasonable period of time that the Board had continued the public hearing on the application without a final decision.

Following a Conference of Counsel on June 14, 2001, the Committee issued an Order of Remand dated June 20, 2001, which directed the Board to terminate the public hearing phase of the process on or before July 18, 2001, and to render a written decision on or before August 27, 2001. See HAC Order of Remand (June 20, 2001). Subsequently, the Board terminated the public hearing on the comprehensive permit application on July 25, 2001, and voted on the application on August 22, 2001, issuing its written decision on September 10, 2001.[5]

Appellant's vote on the application took place thirty-one days after the close of the public hearing. Section 21 of Chapter 40B states that: "The board of appeals shall render a decision...within forty days after termination of the public hearing and, if favorable to the

5. Appellant also raises concerns about a vote that took place on September 5, 2001, wherein the Board met to review the written decision prepared by Counsel for the Board. In the course of this review, Counsel for the Board reported that, due to error, approximately 30 of the 50 conditions were missing, but that the decision tracked the Board's vote of August 22, 2001. Appellant further alleges inconsistencies between the Board's votes of August 22 and September 5, and the actual conditions as set forth in the written decision issued on September 10. See Applicant's Supplemental Pleading at 3 and 4. The Committee is basing its decision herein on the written decision issued on September 10, 2001, which served as the basis for the testimony and arguments of both Parties throughout the Hearing.

applicant, shall forthwith issue a comprehensive permit or approval." The regulations at 760 CMR 30.06(8) state that: "The decision of the board shall be memorialized by a written decision. ... An appeal may also be taken if no written decision is received within forty days after determination of the public hearing."

In this particular matter, a decision was rendered in less than forty days after the close of the hearing, although the written decision took somewhat longer. The Board's failure to issue its written decision prior to September 10, 2001, shall not be deemed, as a matter of law, to constitute a constructive grant of approval. The lengthy hearings and numerous documents presented for consideration, both before the Board and the Committee, demonstrate the significant complexity of the issues raised by the proposed development. The Order of Remand did not set forth a sanction for failure to file a written decision within the forty-day period. The procedural posture of a case changes considerably once an appeal to this Committee has been filed under G.L. c. 40B, § 22, and there is no specific statutory authority requiring us to rule that the Board's delay in rendering a written decision should result in the constructive grant of the comprehensive permit when the appeal was already properly before us.

D. Technical Deficiencies

The Board alleges that Archstone has failed to satisfy the requirements of 760 CMR 31.02(2)(h) by failing to submit a list of requested exceptions to local requirements and regulations, including local codes, ordinances, by-laws or regulations. See Appellee's Post-Hearing Memorandum. In its application, Archstone submitted a List of Requested Exceptions in which it set forth seven specific exceptions it was seeking from the City of Woburn Zoning Ordinances and the Woburn Planning Board Land Subdivision Rules and

Regulations. See Exhibit 3 at Part VII, Page 13. Part VII did not include any request for exceptions to the use or dimensional provisions of the Zoning District (R-1) in which the proposed development was located.

Subsequent to its initial application, Archstone submitted Addendum No. 1 to the application on November 15, 2000. See Exhibit 21. Part VII of Addendum No. 1 states that: "The following is a brief explanation of the seven requested exceptions from the Woburn Zoning Ordinance and Subdivision Rules and Regulations, as enumerated by the Applicant at the October 18 Board of Appeals hearing...As noted in Requested Exception 8, the applicant has added a request to address the possibility that there may be provisions in other local codes, ordinances, by-laws or regulations that are inconsistent with aspects of its comprehensive permit application." See Appendix 21 at 17.

Archstone's Addendum No. 2 to the Application is dated January 9, 2001. See Exhibit 22. Addendum No. 2 included an Exceptions Table which listed each of the seven requested exceptions identified in the original application, and compared each original request for an exception with its current status in the Board's process. See Exhibit 22 at 13. Addendum No. 2 was created in response to the Planning Board's request for clarification and/or information, following a Planning Board meeting with Archstone. See Exhibit 22 at 2. The Exceptions Table set forth in Addendum No. 2 did not include the general request for exceptions that was included in Addendum No. 1.

The Board argues that the general request for Exceptions found in Addendum No. 1, as well as the failure to repeat the general request for exemptions in Addendum No. 2, do not meet the requirements of 760 CMR 31.02(2)(h). Accordingly, the Board asserts that, as a result of Archstone's failure to identify in its application each specific exception requested, the

proposed development is subject to any local requirement for which no exception has been sought. See Transcript Vol. XXVIII at 66.

With respect to the lists of exceptions sought by Archstone, the application, combined with Addenda Nos. 1 and 2, are not models of clarity. The confusion, however, does not rise to the level of requiring that components of this proposed development be evaluated outside the Chapter 40B process.

The Committee's general approach is to apply the comprehensive permit application requirements in a common sense, rather than an overly technical, manner. See *Scippa v. Wayland Board of Appeals*, No. 00-12, slip op. at 5 (Mass. Housing Appeals Committee Jul. 17, 2002). Failure to submit a particular item shall not necessarily invalidate an application. See 760 CMR 31.02 (2). Archstone's failure to identify with specificity each exception sought and, instead, rely on a generalized effort to address ones it may have missed, did not appear to impact negatively the Board's decision-making process. In fact, Condition No. 46 of the Board's decision specifically responds to Archstone's request for a blanket exception. See Exhibit 13, Condition No. 46 at 15. Finally, any remaining areas of uncertainty with respect to the exceptions sought were fully addressed at the Committee hearing.

IV. WHETHER THE CONDITIONS RENDER THE DEVELOPMENT UNECONOMIC

Where the Board has granted a comprehensive permit with conditions, the Appellant has the burden of proving that the conditions in aggregate make construction and operation of the housing "uneconomic". See 760 CMR 31.06(3) and *Hastings Village, Inc. v. Wellesley Board of Appeals*, No. 95-05, slip op. at 10 (Mass. Housing Appeals Committee Jan. 8, 1998).

The totality of conditions imposed is not determinative; a developer who proves that one Condition alone renders the project uneconomic has met its burden. See *Hastings Village, supra* at 12, n.7.

The burden then shifts to the Board to prove that its decision is consistent with local needs, that is, that there is a valid health, safety, environmental, design, open space, or other local concern which supports the conditions imposed, and that such concern outweighs the regional need for housing. See 760 CMR 31.06(7). See also *Northern Middlesex Housing Associates v. Billerica Zoning Board of Appeals*, No. 89-48, slip op. at 8 (Mass. Housing Appeals Committee De. 3, 1992).

In addressing whether the conditions imposed result in a project becoming uneconomic, it is difficult, if not impractical, to separate that analysis from whether the conditions are consistent with local needs. The evidence and arguments relate to both issues and their relationship to each other. See *Lexington Ridge Associates v. Lexington Board of Appeals*, No. 90-13, slip op. at 8 (Mass. Housing Appeals Committee Jun. 25, 1992). Indeed, consistency with local needs is the central issue in all cases; conditions imposed by a Board that are consistent with local needs are not to be vacated, modified, or removed, even if such conditions have the effect of making the proposal uneconomic. See *Id*. See also Chapter 40B, sec. 23 and 760 CMR 31.05. With respect to this proposed development, the issues are particularly difficult to separate. Nonetheless, the Committee will first analyze Appellant's position that the conditions imposed by the Board make it impossible to build or operate low or moderate income housing and still realize a reasonable return as defined by the applicable subsidizing agency. See 760 CMR 31.06(3)(b).

The following analysis of whether the Board's conditions cause the proposed development to be uneconomic should be prefaced with an observation about the extensive testimony on this topic. Through lengthy oral testimony and detailed exhibits, the record reflects an extraordinary level of detail addressing the financial impacts of both the proposed development and the conditions which the city seeks to impose. In doing so, the positions of both parties were well-articulated. It is also important to note that much of the testimony regarding whether the Board's decision rendered the proposed development uneconomic focused on a key component of the decision, specifically, its requirement that Archstone be limited to a maximum of 300-units, reducing the proposed development by more than 50%. See Exhibit 13, Condition Nos. 1 and 8 at 10 and 11.

Emerging from the point/counterpoint of the financial details, however, is the conclusion that the Appellant has not carried its burden of proving that the conditions render the proposed development uneconomic.

A. Stipulation Regarding Methodology

As set forth in the Pre-Hearing Order, the Applicant may establish its *prima facie* case by proving that, within the limits set by the New England Fund (NEF) and without substantially changing rent levels and unit sizes proposed, the conditions make it impossible to proceed in building or operating low or moderate income housing and still realize a reasonable return as defined by the NEF program. See Pre-Hearing Order at 4.

At the hearing, the parties entered into the following stipulation: "For purposes of this hearing, the parties agree that the maximum return on equity which is established by the

Federal Home Loan Bank, New England Fund as 10 percent shall be calculated using the same methodology used in MHFA rental programs." See Transcript Vol. VIII at 5.[6]

Pursuant to this framework, Appellant's expert, Richard Bonz, testified at great length regarding the MassHousing's policy and formula for calculating return on equity (ROE), and then applied that formula to the proposed development. In response, the Board's expert witness, W. Todd McGrath, presented an alternative framework for determining the financial feasibility of multi-family rental developments that involved an analysis of the internal rate of return (IRR). Appellant vigorously objected to Mr. McGrath's testimony because, among other things, its reliance on an IRR analysis was substantially different than the analysis calculated under the MassHousing formula. Although Mr. McGrath offered credible testimony on the use of IRR as a method of determining whether the conditions cause the proposed development to be uneconomic, the Committee agrees with the Appellant that the Pre-Hearing Order and related Stipulation do not allow for consideration of his alternative analysis to the MassHousing methodology.

B. Application of Methodology

The analysis does not end, however, with the acceptance of the Appellant's position with respect to the methodology to be applied. Notwithstanding all of the Appellant's expert testimony, reasonable questions arise regarding whether the costs provided by the Appellant credibly demonstrate that the Board's conditions (particularly with respect to the limitation on the number of units) render the proposed development uneconomic.

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6. The Parties also agreed that the terms MHFA and MassHousing would be used interchangeably to refer to the same entity. See Transcript Vol. VIII at 5.

For example, two *pro forma* financial statements for the operation of a 640-unit development and for a 300-unit development prepared by Appellant's expert witness, Scott D. Shaull, were the subject of extensive testimony. See Exhibits 59 and 60. See also Transcript Vol. VII and Vol. XII.

Notwithstanding Mr. Shaull's detailed testimony and preparation of related exhibits, it is clear that changes to various inputs in his exhibits would significantly alter the potential profitability of the proposed development. In particular, the Committee's attention is drawn to Mr. Brackett's cross examination of Mr. Shaull with respect to language in the Agreement of Purchase and Sale regarding Northeastern University's commitment, as the owner of the property, to financially assist Archstone if Archstone's mitigation costs exceed four million dollars.[7] Specifically, and as Mr. Shaull testified, pursuant to the Third Amendment to the Agreement of Purchase and Sale, Northeastern, as seller, agrees to reduce the purchase price if the mitigation costs exceed certain thresholds. See Transcript Vol. XII at 50-52. See also Exhibit 102.

Of particular interest is the following testimony:

Q. (by Attorney Brackett): But while Exhibit 59 and 60 show no potential contribution by Northeastern, in fact, Archstone has a right to a contribution by Northeastern to the tune of $1,385,000 for any costs which exceed the $4 million budget, isn't that true?
A. (by Mr. Shaull): That is an accurate statement of the third amendment of the contract.
Q. And so, when you testified on direct examination that, do you recall that you testified that the pumping station costs equated to $751,000 as imposed by the Zoning Board?
A. That sounds accurate.

7. Overall, the Agreement of Purchase and Sale did not reflect a fixed cost, but rather varied depending on the number of units constructed. See, e.g., Testimony of Mr. Schaull, Transcript Vol. VII at 86 and 88.

Q. And...you performed a calculation that that particular cost equates to approximately 7 basis points?
A. That sounds accurate.
Q. And you then deducted those basis points from the potential return of 6.07 percent shown on Exhibit 59, didn't you?
A. I believe I did.
Q. And yet, that $751,000 cost may actually be reimbursable by way of a credit from Northeastern University, isn't that true?
A. That may be a reimbursable, yes.
Q. And when you testified in response to Mr. Blaesser's question regarding the decision imposing a requirement for a new 6-inch water main, you testified based on Mr. Adams' testimony that was approximately $675,000, isn't that true?
Q. And then you proceeded to equate that to approximately 4 basis points, which would then reduce the yield under Exhibit 59 further from 6.00 to 5.96 percent. Do you recall that testimony?
A. That sounds accurate.

See Transcript Vol. XII at 61-63.

Mr. Shaull's failure to include in his direct testimony and written exhibits the potential for reimbursement by Northeastern for the mitigation costs reflected in Exhibits 59 and 60 significantly undermined his credibility. Moreover, this issue is further relevant as an example of how a change to the input numbers can significantly alter the calculations provided to support Appellant's position that the conditions render the proposed development uneconomic.

In another example, Gary Truitt, Senior Vice President of Production for Archstone, testified, among other things, with regard to Exhibits 32 and 33, budget *pro formas* prepared for a 640-unit project and for a 300-unit project. These *pro forma*s set forth costs for such capital budget inputs as general conditions, site work, building costs, landscape costs, and general contractor's fees. See Transcript Vol. III at 34. The essence of Mr. Truitt's testimony and related Exhibits is that there would be very little difference in Archstone's site development costs for a 300-unit project and for a 640-unit project.

Initially, Mr. Truitt was unwilling to provide the underlying basis for his estimates as set forth in Exhibits 32 and 33, causing counsel for the Board to object to Mr. Truitt's testimony. See Transcript Vol. III at 80. Following a ruling by the Hearing Officer, Mr. Truitt provided further testimony to support the budget *pro forma* calculations and corresponding exhibits. See Testimony of Gary Truitt at Transcript Vol. III at 27-88. See also Vol. IV at 1, *et seq*.

Even with the additional information, however, Mr. Truitt's testimony was not sufficiently persuasive. As with other witnesses, questions were raised regarding the validity of the inputs and the use of biased sources of information upon which the financial calculations were based, sufficient to undermine the overall credibility of his exhibits.

Additional questions were raised during the testimony of Mr. Bonz, who, testifying for the first time as an expert witness, provided testimony with respect to over forty exhibits accepted into evidence. Through Mr. Bonz, Appellant introduced detailed testimony on MassHousing policies and its ROE formula (including Appellant's expressed hope that the testimony will assist the HAC in its review of future comprehensive permit appeals). See Post-Hearing Brief of Appellant at 59. His testimony on specific financial aspects of the proposed development, however, lacked credibility. For example, in relying upon certain exhibits prepared for his financial analysis, Mr. Bonz did not independently confirm the purchase price of the proposed development property, even though there were different prices reflected in the documents upon which he relied. See Transcript Vol. X at 95-99. Mr. Bonz also testified with respect to his preparation of an "Analysis of Comparable Single Family Land Sales" which served as the basis for determining an "Estimated Northeastern University site Value". See Exhibit 72. Of the four "transactions" set forth in this Exhibit, the one

property which reflected the highest price – and, thereby, significantly impacted the "average" – was not an actual sale but, rather, an unaccepted offer to purchase.[8] Similarly, Mr. Bonz included the Proposed Development property in an "Analysis of Comparable Rental Apartment Land Sales", the inclusion of which significantly raised the Estimated Market Value per Unit. See Exhibit 77. See also Testimony of Mr. Bonz, Transcript Vol. X at 122 and 123.

Mr. Bonz also testified that an underlying assumption in the development of a number of his exhibits was that permanent financing would be part of Archstone's costs, even though it was Mr. Bonz' understanding that Archstone only intended to secure construction financing for the proposed development. See Transcript Vol. X at 142 and 143. Mr. Bonz admitted that the calculations reflected in his exhibits would have to be adjusted based on the amount of financing actually secured, if any. See Transcript Vol. X at 145. Further questions were raised with respect to Mr. Bonz's "Analysis of Market Area Rental Apartment Vacancy Rates", particularly with respect to whether a higher vacancy rate than necessary was assumed in the analyses. See, e.g., Exhibit 82 and Transcript Vol. XI at 4-11.

Additional potential for significant variability in the cost estimates provided can be found in Exhibits 51 and 52, which detail Archstone's site Work Construction Cost Estimate Comparison for a 300-unit project and for a 640-unit project. These cost estimates were prepared by John A. Adam, a credible witness who provided detailed information regarding the basis for each of his estimates. See Transcript Vol. VI. In response, however, the Board offered the testimony of Frederick W. Russell, Jr., Woburn's Superintendent of Public Works.

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8. The Committee is not persuaded by Appellant's efforts to note that the offer was made in the context of a request for proposals. See Transcript Vol. XVI at 38.

Mr. Russell challenged several of the estimates for not sufficiently taking into account efficiencies that could be achieved by the project's reduction in size from 640-units to 300-units. See, e.g., Transcript Vol. XIV at 45-54. Mr. Adam's cost estimates were also countered by equally credible testimony from Sharon T. Raymond, Woburn's expert witness in the field of engineering. See Transcript Vol. XVIII at 77 *et seq*.

While not all of the issues raised by the Board's witnesses were relevant, they were sufficient in their totality to cast doubt on the testimony of Appellant's experts, particularly with respect to the significant variance in the inputs used in the financial analyses presented. As Mr. Adam noted in his testimony: "Cost estimating is not an exact science." See Volume IV at 127. And, with respect to this proposed development, far more questions than answers remain. We conclude, after a review of all of the evidence with respect to whether the Board's conditions render the proposed development uneconomic, that notwithstanding Archstone's diligence, it has not proven that the conditions make the building or operation of the housing uneconomic.

V. WHETHER THE CONDITIONS ARE CONSISTENT WITH LOCAL NEEDS

A. Overview

Having determined that the Appellant did not meet its burden of proving that the Board's Condition rendered the proposed development uneconomic, the Committee would generally conclude its analysis and uphold the entirety of the Board's decision. In *Cooperative Alliance of Massachusetts v. Taunton Zoning Board of Appeals*, No. 90-05 (Mass. Housing Appeals Committee Apr. 2, 1992), the Committee noted the two-step process required where developers challenge conditions imposed by a board in a comprehensive

permit, stating that the developer must first prove that a condition imposed makes the building or operation of the housing uneconomic. If the Developer has not sustained this burden of proof, no further inquiry into consistency with local needs is necessary. See *Id.* at 8, n.12.

The Committee does not read the *Cooperative Alliance* decision, however, as precluding further analysis of the Board's conditions in every case in which conditions have not been proven to be uneconomic. As noted in that case, if the condition is supported by a legitimate local concern that outweighs the regional need for low or moderate income housing, it certainly must be upheld. But the statute provides no specific guidance if there is no such justification for the condition.

We acknowledge, as we did in *Cooperative Alliance*, that the overall legislative intent is to minimize state intrusion on local prerogatives, but that principle should not be invoked to permit the local Board to act unreasonably. Even with regard to special permits issued under the Zoning Act (G.L. c. 40A, § 9), where the board is given far more deference than under Chapter 40B, it "must act fairly and reasonably…." *MacGibbon v. Board of Appeals of Duxbury,* 356 Mass. 635, 638, 255 N.E.2d 347 (1970); also see *Building Comm'r of Franklin v. Dispatch Communications of New England, Inc.*, 45 Mass.App.Ct. 709, 725 N.E.2d 1059 (2000), rev. den. 431 Mass. 1104, 733 N.E.2d 125 (2000). Further, special permit conditions "founded [only] on broad considerations of the general public welfare" are beyond the authority of the local board. *Middlesex & Boston St. Railway Co. v. Board of Aldermen of Newton,* 371 Mass. 849, 857-858, 359 N.E.2d 1279 (1977).

Under the Comprehensive Permit Law, the focus must be on the local health, safety, and environmental concerns articulated in G.L. c. 40B, § 20 and 760 CMR 31.06(2), (6), (7). Conditions unrelated to these concerns, conditions unreasonably or arbitrarily imposed, or

conditions based on legally untenable grounds should not be allowed to stand. See *MacGibbon v. Board of Appeals of Duxbury, supra* at 639 ("The decision [denying a special permit] cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary."). We will defer to the local board in questionable cases, but, particularly when the board has not articulated a reasonable factual or legal justification for a condition, we will modify or eliminate it.

1. Intensity

The analysis of intensity involves issues such as the adequacy of open space and recreational space, the functionality of common areas, the provisions made for privacy of the tenants, the accessibility of the site to and from other parts of the neighborhood, and related factors which look to whether the number of units are too large—not for the surrounding area—but for the particular parcel of land. See *Hastings Villag*e at 26. The Appellant dismisses intensity as an area of analysis, citing the lack of testimony on the record from the Board's witnesses with respect to these criteria. See Post-Hearing Brief of Appellant at 28.

In substance, however, several of the findings and conditions raised by the Board have relevance to the analysis of intensity. The fact that Board witnesses did not use the specific word in addressing related substantive issues is not determinative. Intensity is an underlying component of a number of the conditions in dispute that are addressed in this decision.

2. Density

An analysis of density involves determining the impact of the development on factors ranging from municipal services and traffic to esthetics and overall livability of the surrounding neighborhood. See *Hastings Village* at 20. But as the Committee has stated: "...density is a subtle issue, and any fruitful analysis must go well beyond simply comparing a

number to some abstract standard." See *Franklin Commons Ltd. Partnership v. the Franklin Board of Appeals*, No. 00-09, slip op. , at 7 (Mass. Housing Appeals Committee Sep. 27, 2001).

In defending its application for 640-units, Appellant argues that the density of the proposed development should be evaluated relative to the size of the site, that is, converting density to an acreage per unit analysis to achieve a gross density number. See Post-Hearing Brief of Appellant at 26. Appellant then argues that, under the city's R-3 Multifamily Zoning District, a total of 647 units would be allowed on the site, sufficient to accommodate the proposed development's density of 8.6 units per acre. See *Id*. at 18 and Transcript Vol. I at 16.

Appellant's land planning expert, Sandy Vance, testified that the preserved natural wetland areas constitute 11% of the proposed development, and that preserved natural upland—that is, heavily wooded areas—constitute an additional 31.27% of the site. In addition, landscaped areas constitute 29.3%, for a total of approximately 72% of the site in some form of open space that would not be developed. See Transcript Vol. I at 68-70. Nonetheless, in calculating density, Mr. Vance simply divided the total site acreage into the number of units. See Transcript Vol. I at 39.

Appellant then compares the site's gross density calculation with that of other developments nearby, and asserts that the higher density of several other residential projects in the immediate area surrounding the site is highly relevant. See Post-Hearing Brief of Appellant at 18. See also testimony of Sandy Vance, Transcript Vol. I at 39-40. Overall, however, the greater mathematical density of other projects in the neighborhood is not

persuasive as a sufficient basis for comparison, without further information about the landforms and other constraints on the development of these properties.

The Committee recognizes the difficulty of calculating an appropriate density. "Density … is seductively easy to quantify, and yet quantification does not provide an objective answer to the question of what density is appropriate." See *CMA, Inc. v. Westborough Zoning Board of Appeals*, No. 89-25, slip op. at 27 (Mass. Housing Appeals Committee Jun. 25, 1992). Nonetheless, the Appellant's analysis and calculations are not persuasive.

Appellant's argument that the R-3 zoning is the relevant district for determining the allowable density is also unpersuasive. The Board rejected any comparison to the R-3 Multifamily Zoning District as the basis for comparison, as the site is actually in the R-1 District which is zoned for single family/townhouse development. See Planning Board Second Report and Recommendation for the Archstone comprehensive permit, Exhibits 128 and 129, at 3. The R-1 zoning would allow for a density of 3 dwellings per acre, for a total development density of up to 225 dwellings (based on 3 units per acre x 75 acres). See *Id*.

But the Appellant cannot argue that the R-1 Zoning District requirements are inapplicable to this Chapter 40B case, and then simply choose another zoning district which it deems more compatible as the relevant basis for comparison. Accordingly, the Appellant's reliance on the R-3 Multifamily Zoning District as providing a sufficiently relevant comparison is not useful in helping the Committee address the density issue. See *Hastings Village* at 22.

But the rejection of these arguments do not resolve the density dilemma. They simply narrow the framework for analysis.

In reviewing the Board's onerous condition to reduce the proposed development by half, the Committee observes that the record is replete with examples of the significant strains the proposed development will impose on municipal services and an already crowded arterial roadway. It is also noteworthy that this may be the largest Chapter 40B proposal that has been before the HAC.

Yet the Committee has made clear that difficulties in providing municipal services should not stand in the way of the development of affordable housing. See *Hilltop Preserve Ltd. Partnership v. Walpole Board of Appeals*, No. 00-11, slip op. at 10 (Mass. Housing Appeals Committee Apr. 10, 2002). This is consistent with the regulatory mandate that the denial of a comprehensive permit can only be based upon the inadequacy of existing municipal services or infrastructure if the local board meets its burden of proof that the installation of services adequate to meet local needs is not technically or financially feasible. See 760 CMR 31.06(8). The regulation further states that financial feasibility may only be considered where there is evidence of unusual topographical, environmental, or other physical circumstances that make installation of the needed service prohibitively costly. See *Id*. Moreover, the Legislature enacted Chapter 40B without any provision authorizing a local board to require a developer to make off-site improvements to municipal services. See *Hilltop, supra* at 10.

The Committee's decision in *Hilltop*, however, also notes that the nature of municipal services varies greatly, as do the facts surrounding different proposed developments and the availability of services in particular locations. See *Id.* As a result, the Committee has fashioned a narrow exception within the framework of the regulation. See *Id*. at 11. It is in this context that specific conditions imposed by the Board will be analyzed.

Appellant argues that the 300-unit limitation cannot be based on the proposed development's impact to municipal services because the Woburn sewer system can adequately serve the proposed development, the water and fire flows systems have long been deficient, and it is not Archstone's obligation to cure these deficiencies. See Post-Hearing Brief of Appellant at 15 and 16. Appellant further asserts that its proposed traffic improvements are sufficient to accommodate its 640-unit size, and that the density of the proposed development will not affect either the visual aesthetics of the area or the overall livability of the neighborhood. See *Id*. at 16 and 17. Further, Appellant refers to the location of the proposed development as "transitional" in that it would be in an extremely active corridor that includes housing (including multifamily housing), office space, and research and development. See *Id*. at 18. The adequacy of municipal services and traffic impacts relate to several conditions imposed by the Board, and are discussed in greater detail, *infra*.

B. Water and Fire Protection

The Board's decision requires Archstone to construct or fund a new pump station to replace the Shaker Glen Pump Station. The new pump station must be adequate to provide satisfactory water service to the West Side High Service Area, which includes the proposed development, and must meet the anticipated water service requirements of the area for a reasonable period of time. See Exhibit 13, Condition No. 9 at 11. The Board further requires that Archstone remove or fund the removal of a 6-inch water main from the Bedford Road intersection to the Four Corners intersection, and replace it with a 12-inch water main. See Exhibit 13, Condition No. 10 at 11. The Board also requires that Archstone loop the low water service portion of the site between the Whispering Hill Tank and Kosciusko Street. See Exhibit 13, Condition No. 11 at 11.

As justification for requiring that the Shaker Glen Pump Station be rebuilt, the Board found that: (i) the Pump Station has surpassed its useful life; (ii) it was scheduled for replacement; (iii) implementation of such a large project would increase demand on the existing Pump Station and negatively affect its performance; and (iv) replacement of the Shaker Glen Pump Station to service the proposed development and surrounding area was necessary to assure sufficient water service. See Exhibit 13, Finding No. 13 at 4. See also Exhibit 54.

As justification for requiring the replacement of the 6-inch main with a 12-inch main, City Engineer John Corey stated that the proposed development could not be provided with adequate fire protection until a new 12-inch main was constructed. See Exhibit 54, Memorandum of City Engineer, at 1. See also Exhibit 13, Finding No. 14 at 4.

As justification for requiring the looping of the low service portion of the Project, Mr. Corey stated that a water main depicted on the preliminary utilities plan submitted by Archstone did not show a distinction between the high and low water service areas, and recommended that the low service portion of the project site be looped to provide redundant paths of flow for transmission of water, particularly fire protection. See Exhibit 54, Memorandum of City Engineer, at 1. See also Exhibit 13, Finding No. 15 at 4. See also Transcript Vol. XV at 22.

Appellant had voluntarily proposed to replace the Shaker Glen Pump Station and to construct a portion of the 12-inch replacement for the 6-inch water main under the proposed 640-unit development, but challenges these conditions as financially infeasible under a 300-unit cap. See Appellant's Post-Hearing Brief at 41.

Deficiencies in the City of Woburn's water supply system are significant and long-standing. See CampDresser & McKee ("CDM") reports at Exhibits 107 and 108. City Engineer Corey testified that in its 1989 and 2001 reports, CDM noted that the Shaker Glen Pump Station did not meet the standards of the American Water Works Association ten state standards, the typical design criteria used for water works infrastructure, nor did it meet the design standards established by DEP. See Transcript Vol. XV at 45-48. But Mr. Corey also testified that by replacing pumps when needed, the Shaker Glen Pump Station was adequately serving the existing area; although such a system would be inadequate to address a project the size of the proposed development. See Transcript Vol. XIV at 148. Mr. Corey further testified that a new pump station would be required whether the Project is 300 or 640-units. *Id*. at 147. With respect to water flows, Mr. Corey acknowledged that, in both reports, CDM found the fire flows inadequate along Cambridge Street. See Transcript, Vol. XV at 53 and 54.

The regulatory burden is high with respect to the Board's conditions regarding these municipal services. The thrust of Mr. Corey's testimony was that a massive project on this parcel would throw out of balance a system that was barely adequate to meet existing needs. But as pointed out in the *Hilltop* decision, the nature of municipal services varies greatly, as do the facts surrounding different proposed developments and the availability of services in particular locations. See *Hilltop, supra* at 10. "For certain types of municipal services, our regulation applies straightforwardly. But for others, notably water and sewer services and roadways, while the general principle in the regulation that the town must provide municipal services usually applies, in certain cases, based upon careful factual analysis, we have fashioned a narrow exception within the regulation." See *Id.* at 10 and 11.

With respect to water service, and consistent with *Hilltop*, a developer can be required to provide limited mitigation of specific problems if the problems are necessitated by the new development itself. See *Hilltop, supra* at 15. Mr. Corey testified that the current water delivery infrastructure is being nursed along, until sufficient funds are available to implement the city's ten-year capital improvement plan for the water system. See Testimony, Vol. XV, at 66-68.

Mr. Corey was steadfast in his testimony, however, that, until such time as the capital improvement plan is implemented, the city expected to make the existing system function. The essence of his testimony was summarized as follows: "Well, in my opinion, as I have stated previously, if the project goes forward in either scenario, it would put an overburden on the Shaker Glen Pump Station as it currently exists, and No. 2 is we could not adequately provide fire flows to that development." See Transcript, Vol. XV at 69. Under questioning by Counsel for Archstone, Mr. Corey acknowledged the city's lack of a specific analysis to determine that portion of the impact to the water main that would be attributed to Archstone*'s* proposed development. See Transcript, Vol. XIV at 152 and 153.

Nonetheless, Mr. Corey was a credible witness who showed a detailed working knowledge of the town's water supply infrastructure. Notwithstanding the system's substantial inadequacies, enough maintenance and repairs had been conducted to keep the system functioning. In addition, a capital improvement plan had been developed to address the shortcomings over time. We find Mr. Corey's testimony that the city would not be able to serve adequately a large subdivision of 300 or more units to be credible. Accordingly, the Board's conditions No. 9, 10 and 11 will be upheld.

C. Impact of proposed development on Residents in Close Proximity

The Board's decision imposes a 300-foot no build/no cut zone around the perimeter of the property, (other than Cambridge Road), apparently in response to a letter from a neighborhood organization, which requested a 300-foot buffer zone along the boundaries of the property. See Exhibit 13, Finding No. 24 at 7 and Condition No. 20 at 12.

The Committee shares the Appellant's concern about the Board's failure to recognize the relationship between its requirement of a 300-foot buffer zone and the impact such a buffer zone would have on available developable land when such a Condition is combined with the restriction to 300 units. Appellant's expert land planner, Sandy Vance, testified that a 300-foot no build/no cut zone, in conjunction with the naturally occurring site constraints (such as steep slopes and wetlands), would reduce the amount of developable acreage at the site to 12.8 acres. See Transcript Vol. I at 118.

When Mr. Vance developed a hypothetical site plan which included the no build/no cut zone and other key conditions imposed by the Board, the plan supported only 64 rental units, plus the community center. See Transcript Vol. I at 128. Yet the Board's Findings stated that a 300-foot no build/no cut zone is particularly reasonable when viewed in light of the reduction in density to 300-units, as such conditions together help preserve the character of the neighborhood as much as possible. See Exhibit 13, Finding No. 24 at 7. It is troubling that this Condition appears to have been imposed without a basis in land planning analysis, and without knowledge of the actual impacts to the proposed development.

Counsel for the Board has conceded that this Condition is not consistent with the Board's approval for 300 units, and requested, in closing argument, that the Condition be directed back to the Board to be stricken from its decision. See Transcript Vol. XXVIII at 77.

Appellant argues that, because there is no evidence on the record that the Board has withdrawn Condition Number 20, it must be stricken by the Committee. See Post-Hearing Brief of Appellant at 31. Whether the Condition is remanded back to the Board to be stricken, or whether the Committee strikes the Condition, may be a distinction without a difference in light of Board counsel's specific acknowledgement that this Condition is inconsistent with the Board's Approval. See Post-Hearing Memorandum of Appellee at 14-15. Nonetheless, the 300-foot no build/no cut zone shall be stricken as a Condition.

D. Building Height: 2 ½ Story Height Limitation

The Board's decision requires Archstone to comply with the building height requirements of the Zoning Ordinance, in effect, creating a 2½-story or 35-foot height limitation. See Exhibit 13, Condition No. 18 at 12.

Appellant argues that, because the building height of the proposed development satisfies the height limitation in feet as set forth in the city's zoning requirements, then the 2½-story limitation imposed by the Board is arbitrary. See Post-Hearing Brief of Appellant at 32. But the table of dimensional regulations in the Woburn zoning ordinances sets forth separate restrictions regarding the number of stories allowed and the specific allowable height. The Board's separate analysis of both, therefore, is not arbitrary. See City of Woburn 1985 Zoning Ordinances at Exhibit 17, Table of Dimensional Regulations at 6.1.

In the context of this Chapter 40B analysis, however, there is insufficient evidence submitted either through testimony or in the Board's decision to demonstrate how Archstone's proposal, which did not exceed the maximum height requirement, creates an adverse visual impact. Accordingly, the Board's decision is not consistent with local needs and the condition

requiring Archstone to limit its development to 2½ stories shall be stricken, as long as the 35-foot maximum building height is not exceeded.

E. Emergency Access

In response to a recommendation of the Planning Board, the Board's decision requires Archstone to construct a way from Sylvanus Wood Lane to the project site and then "...take all reasonable steps to ensure that the travel lane(s) are gated, locked, and restricted to emergency vehicle use, and restricted to one-way vehicle use only, from Sylvanus Wood Lane to the project site." See Exhibit 13, Condition No. 13 at 12 and Finding No. 17 at 5.

In his original review, Fire Chief Paul Tortolano stated that Archstone's proposed roadway connecting the site to Sylvanus Wood Lane would be considered acceptable. See Exhibit 116. Similarly, in his testimony, the Fire Chief confirmed this review and acceptance of Archstone*'s* proposed configuration. See Transcript, Vol. XVII at 23 and 24. Nothing in the Fire Chief's additional testimony provided a sufficient basis to warrant a change of position from his earlier acceptance of the configuration or to warrant imposition of design requirements in excess of those proposed by the developer. Therefore, the Committee upholds Condition No. 13 to the extent that it requires emergency access in conformity with the design proposed by the developer.

F. On-site Traffic

1. Collector Street

To address traffic conditions inside the proposed development, the Board required that an access drive from Cambridge Road to just south of the proposed on-site rotary be constructed in accordance with the collector street construction standards prescribed in the Planning Board's 2000 Land Subdivision Rules and Regulations. See Exhibit 13, Condition

No. 15 at 12. The Board based the imposition of Condition Number 15 on the Planning Board's recommendation as set forth in its Second Report dated February 28, 2001. See Exhibit 13, Finding No. 19 at 5. See also Exhibit 128.

The record is replete with Appellant's objections to and the city's basis for imposing the collector road standards. In its Post-Hearing Brief, the Appellant alleges unfair treatment in that the city would be imposing a standard it had not previously applied to a private multi-family subdivision (and, in fact, had only applied once to a commercial subdivision). See Post-Hearing Brief of Appellant at 47. In addition, Appellant went to significant lengths throughout the hearing to describe the difficulty of meeting the collector road standards. See, e.g., testimony of Sandy Vance, Transcript Vol. I at 123-125. See also testimony of Robert Daylor, Transcript Vol. XXII at 113-121.

The parties spent a great deal of time arguing about the details of the specific standards of Condition No. 15 with respect to, for example, the median, sidewalk requirements, and related roadway design issues. Notwithstanding all the testimony and related arguments of counsel regarding the applicable standards and technical issues arising out of Condition No. 15, the record is sparse with respect to what the city is trying to accomplish with the imposition of these standards and in addressing why this road as originally proposed in the application was unacceptable. Moreover, this becomes a particularly frustrating area of analysis for the Committee because the Appellant seemed determined to bind the city into adhering to a stricter interpretation of the condition than may have been necessary.

The primary rationale for the imposition of Condition No. 15 seems best articulated in the report of the Woburn Chief of Police, Philip L. Mahoney, which stated, "Another Access road should be built from the Burlington side to the property to intersect at the looped part of

the roadway. If the Access road is blocked on this section (between Access road and the rotary), no public safety vehicle could access the site. If this cannot be accomplished, the main road should be made to conform to the collector street. This would require the roadway to be 40ft wide and no more than a 6% grade. Sylvanus Wood Lane is approximately a 10% grade and is sometimes not usable during winter storms." Exhibit 124, letter from Police Chief Philip L. Mahoney (March 12, 2001).

Responding to the city's concerns about whether blockage in the roadway would prohibit emergency vehicle access to the site, Appellant's professional transportation engineer, Robert Michaud, stated that the road as proposed in the application provided sufficient access by the use of mountable curves and other elements that would allow the bypassing of a vehicle if that were required. See Transcript Vol. V at 84. Appellant also objected to the Planning Board's contention that a collector road would provide for smoother traffic flow by stating that a wider street encourages faster traffic and can create safety problems. See testimony of Sandy Vance, Transcript Vol. II at 70.

Upon review of all the testimony and related documents addressing the collector road issue, the evidence does not demonstrate that emergency rescue vehicles would be unable to access the site when needed under the proposed configuration in the application. The Committee concludes that the Board has shown no reasonable basis for imposing the collector road requirements. Accordingly, that portion of Condition No. 15, which requires an access drive from Cambridge Road to just south of the proposed on-site rotary in accordance with the collector road construction standards, shall be stricken.

2. Parking Aisles

The Board's decision requires that Archstone comply with a recommendation of the city's peer review traffic consultant concerning on-site traffic issues, including traffic circulation and travel unimpeded by undue interference from parked vehicles. See Exhibit 13, Condition No. 26 at 13.

The city's peer review traffic consultants, Bruce Campbell & Associates, Inc., recommended that parking aisles not be allowed to serve as driveway aisles, because vehicle conflicts could arise from vehicles backing out of parking spaces into the site roadways. In response to this recommendation from the city's traffic consultants, the Appellant's traffic expert, Robert Michaud, noted that the proposed roadway is a "...common, safe vehicular circulation design practice." Mr. Michaud further explained that the roadways were designed to be low-speed and spacious driveway aisles, which incorporated elements to reduce traffic speeds and, thereby, avoid vehicular conflicts arising from parking in the roadway. He also noted that separating all parking from travel drives would create more pavement on the site Plan and increase storm runoff, grading, and a reduction in open space areas. See Exhibit 132 at 10.

The Appellant provided credible testimony that the on-site roadway and parking set forth in the application allows for the safe and convenient access to building units. See *Id.* The Board has shown no reasonable basis for its position, and accordingly, those aspects of Condition 26 and Condition 16 which prohibit on-site parking within the access ways and restrict parking to designated lots shall be stricken.

G. Wetlands

The Board's decision requires that the proposed development be constructed in accordance with the requirements of the Massachusetts Wetlands Protection Act and the Woburn Wetlands Ordinance. See decision at Exhibit 13, Condition No. 19 at 12. In its findings, the Board stated that such a condition was appropriate in light of the "...issues of wetlands on the project site, the location of proposed buildings in relation to these wetlands, and the impact of the project on these wetlands and their buffer zones.…" See Exhibit 13, Finding No. 23 at 7.

Appellant argues that once the Board renders its decision, the role of the Conservation Commission is to review issues arising under the Wetlands Protection Act, and not issues arising under the local Wetlands Ordinance. Accordingly, Appellant acknowledges that it "…has a future date with the Conservation Commission…," but only with respect to the Commission's role in applying the Massachusetts Wetlands Protection Act. See Post-Hearing Brief of Appellant at 55. The Appellant is correct.

The statute requires that the "board of appeals shall forthwith notify each … local board… of the filing of [a comprehensive permit] application … [and] shall request the appearance … of … representatives of said local boards… and shall have the same power to issue permits or approvals as any local board…." G.L. c. 40B, § 21. For several reasons, the Woburn Conservation Commission is clearly a local board. First, it is defined as such in 760 CMR 30.02 ("Local board means any local board or official, including… conservation commission…."). Second, from its earliest cases, the Committee has rejected the notion that conservation commissions (and historic district commissions) are outside of the jurisdiction of the Comprehensive Permit Law. *Planning Office for Urban Affairs, Inc. v. Lexington*, No. 73-

03, slip op. at 7-8 (Mass. Housing Appeals Committee Aug. 29, 1974), *aff'd*, No. 74-1721 (Middlesex Super. Ct. Feb. 27, 1975)(rejecting the town's position, which it states as arguing that "these agencies are not 'local boards,'" and instead concluding that the developer will "meet the requirements of both organizations"); also see, *Wilmington Arboretum Apts. Assoc. Ltd. Partnership v. Wilmington*, No. 87-17, slip op. at 25-28 (Mass. Housing Appeals Committee Jun. 20, 1990)(related analysis of water and sewer commission), *aff'd*, 39 Mass. App. Ct. 1106 (1995)(rescript); *Anglewood Housing Development Ltd. Partnership v. Kingston*, No. 90-06, slip op. at 7, ¶ 6 (Mass. Housing Appeals Committee Aug. 4, 1993)(Interim Order asserting jurisdiction over local wetlands bylaw). And finally, the Supreme Judicial Court's reasoning in its recent ruling that a town historic committee is a local board under the Comprehensive Permit Law applies with equal force to conservation commissions. See *Dennis Housing Corp. v. Zoning Board of Appeals of Dennis*, 439 Mass. 71, 785 N.E.2d 682 (2003). Because a conservation commission is a local board, any issues that may arise under a local wetlands ordinance or bylaw are subsumed within the board of appeals' comprehensive permit hearing process and decision.

Thus, while the Woburn Conservation Commission should fully review the proposal under the state Wetlands Protection Act, its review under the Woburn ordinance is limited. As noted in our regulations, "A comprehensive permit issued by a Board… shall be a master permit which shall subsume all local permits and approvals normally issued by local boards. Upon presentation of the comprehensive permit and subsequent detailed plans, all local boards shall issue all necessary permits and approvals after reviewing such plans only to insure that they are consistent with the comprehensive permit and applicable state and federal codes." 760 C.M.R. 31.09(3).

Accordingly, that portion of Condition 19 requiring Archstone to construct the project in accordance with the Woburn Wetlands Ordinance shall be stricken and that portion of Condition 19 requiring Archstone to appear before the Conservation Commission to review the project in accordance with the Wetlands Protection Act shall be upheld.

H. Monitoring Wells

The Board required that "for the safety of residents, Archstone shall provide monitoring wells, during construction and in the future, to verify the absence of contamination to Woburn's groundwater." See Exhibit 13, Condition No. 45 at 15. The Appellant objects to this requirement as unreasonable, arbitrary, and unnecessary. See Applicant's Supplemental Pleading at 13 and 14.

This Condition imposed by the Board sets forth no framework for creating such a monitoring program, sets no standards by which the "absence of contamination" should be measured, nor sets any limits as to how far into the future monitoring should be continued. Nor is there any indication that the proposed development, which will be connected to the Woburn sewer system, creates any unusual potential for groundwater contamination. The Board has shown no reasonable basis for this condition, and accordingly, Condition No. 45 shall be stricken.

I. Affordable Units

The Appellant challenges the Board's requirement that affordable units shall be maintained in perpetuity as unreasonable and inconsistent with the New England Fund program. See Exhibit 13, Condition No. 5 at 10. See also Applicant's Supplemental Pleading at 15 and 16.

The Housing Appeals Committee has recognized the policy considerations supporting perpetual affordability, and has approved such conditions in the past. *Lexington Ridge Assoc. v. Lexington*, No. 90-13 (Mass. Housing Appeals Committee June 25, 1992). Recently, the Supreme Judicial Court has also addressed this issue, stating that "unless otherwise expressly agreed to by a town, so long as the project is not in compliance with local zoning ordinances, it must continue to serve the public interest for which it was authorized." *Zoning Board of Appeals of Wellesley v. Ardemore Apartments Ltd. Partnership*, 436 Mass. 811, 825, 767 N.E.2d, 584, 594 (2002). Accordingly, Condition No. 5 shall be upheld.

J. Blasting Activity

The Appellant has challenged the Board's requirement that neighboring residents be provided with equipment adequate to monitor the impact of blasting activity on their house. See Exhibit 13, Condition No. 22 at 12. This Condition is based on a request by the neighborhood organization, Residents Against Northeastern Development, that residents of houses within five hundred feet of the blasting activity should have monitoring equipment made available to them. The Board found that such a request was appropriate to include as a condition of its grant of a comprehensive permit. See Exhibit 13, Finding No. 26 at 7.

Appellant's expert, Robert Daylor, testified that, in his experience as an engineer and in his work on development projects, he had never seen such a condition or procedure imposed. Mr. Daylor described the normal safety precautions undertaken during periods of blasting operations, which include extensive coordination with the local fire department, pre-blasting surveys of dwelling units within 250 feet of any proposed rock excavation, and related procedures. See Transcript Vol. III at 19-20. Mr. Daylor further described how

Archstone's procedures would be in compliance with the Commonwealth's Board of Fire Prevention regulations. *Id.* at 21-23.

Mr. Daylor credibly testified that the procedures detailed are fully in accordance with state requirements and offer sufficient protections to the neighborhood. The Board has articulated no justification for Condition No. 22, and accordingly, it shall be stricken.

K. Minimum Slope

In its decision, the Board denied Archstone's request for an exception to the required minimum slope requirement in section IV.G.6.b of the Subdivision Rules. See Exhibit 13, Condition No. 50. That is, the developer requested that instead of the 3:1 slope normally required, slopes of 2:1 be permitted at the project entranceway and 1:1 where rock riprap is used. The developer's expert's testimony that 2:1 or 1:1 slopes are acceptable engineering designs for this roadway is convincing. Archstone's request to vary, in certain instances, from the city's 3:1 requirement will enable it to preserve trees and reduce the amount of rock grading and blasting. See Transcript, Vol. XXII, at 69-72; Transcript, Vol. II, at 101; Exhibit 14. The Board has not articulated a reasonable factual justification for Condition 50, and it shall therefore be stricken.

L. Number of Units

Throughout this hearing, the most challenging aspect of the Board's decision has been the requirement that the proposed development not exceed 300 units. See Decision at Exhibit 13, Condition Nos. 1 and 8 at 10 and 11. As noted previously, the Committee is satisfied that ample evidence exists in the record to support the Board's position that the 640-unit proposed development is too large, imposing significant burdens on the surrounding community. Nonetheless, the Committee remains confounded in trying to discern the Board's basis for

limiting the development to 300 units. The Appellant, through the testimony of such witnesses as Mr. Daylor and Mr. Engler, adequately demonstrated that the record is weak with respect to foundation in land planning and correlation of the 300-unit limitation to land use considerations.

Generally, the nature of the appeal process is such that the Committee will either uphold the reduction in units imposed by the Board or approve the original plan at the size proposed by the developer. It is rarely wise for us to sift through the evidence to attempt to identify an acceptable size ourselves, though, as noted in our decision in *CMA, Inc. v. Westborough*, No, 89-25, slip op. at. 25 (Mass. Housing Appeals Committee Jun. 25, 1992), we will do so under some circumstances. As discussed above, we will consider modifying or eliminating any condition that appears to have been imposed arbitrarily. In this case, the Board appears to have succumbed to the temptation to approach the size of the development in this manner, and since it has not articulated a reasonable justification for the 300-unit limitation, it is appropriate for us to establish an acceptable number of units.

The purchase and sale agreement entered into between Archstone and Northeastern University initially established the purchase price at $23,667,000, based on development approvals for 420 units. Exhibit 102, p. 3. This, we believe, is evidence of the developer's neutral evaluation of the carrying capacity of the site, prior to establishing a bargaining position in its application for the comprehensive permit. Given the Board's failure to establish an appropriate size based on land use considerations, the 420-unit figure, which represents a significant reduction in both percentage and absolute terms, is the best evidence of the acceptable number of units for this proposal.

VI. CONCLUSION AND ORDER

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee affirms the granting of a comprehensive permit by the Woburn Board of Appeals. Further, the Committee concludes, pursuant to G. L. c. 40B § 23, that the conditions imposed by the Woburn Zoning Board have not rendered the proposed development uneconomic, but that certain of those conditions must be modified to render the Board's decision consistent with local needs. The Board is directed to issue an amended comprehensive permit as provided in the text of this decision and the conditions below.

1. The development shall consist of 420 units, of which 336 shall be market-rate units and 84 units (20%) shall be affordable to persons whose income is 50% or less of the area median income, as defined by the United States Department of Housing and Urban Development.

2. The first two sentences of Condition 7 of the comprehensive permit (Exhibit 13, p. 11) shall be deleted, and the following inserted: "Construction on more than 16.24 acres shall not commence during calendar year 2003. Construction on more than 32.38 acres shall not commence during calendar years 2003 and 2004."

3. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 31.09(1), this Final decision shall for all purposes be deemed the action of the Board.

4. Because the Housing Appeals Committee has resolved only those issues placed before it by the parties, the comprehensive permit shall be subject to the following standard conditions:

(a) Construction in all particulars shall be in accordance with all presently applicable local zoning and other by-laws except those waived by this decision or in prior proceedings in this case.

(b) The subsidizing agency may impose additional requirements for site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by the Board or this decision.

(c) If anything in this decision should seem to permit the construction or operation of housing in accordance with standards less safe than the applicable building and site plan requirements of the subsidizing agency, the standards of such agency shall control.

(d) No construction shall commence until detailed construction plans and specifications have been reviewed and have received final approval from the subsidizing agency, until such agency has granted or approved construction financing, and until subsidy funding for the project has been committed.

(e) The Board shall take whatever steps are necessary to insure that a building permit is issued to the applicant, without undue delay, upon presentation of construction plans, which conform to the comprehensive permit and the Massachusetts Uniform Building Code.

This decision may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Housing Appeals Committee

Dated: June 11, 2003

Werner Lohe, Chairman

Joseph P. Henefield

Marion V. McEttrick

Frances C. Volkmann

Lauren Stiller Rikleen
Hearing Officer

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